

Kelly Richardson
Direct Dial: (619) 238-2876
kelly.richardson@lw.com

600 West Broadway, Suite 1800
San Diego, California 92101-3375
Tel: +1.619.236.1234 Fax: +1.619.696.7419
www.lw.com

LATHAM & WATKINS LLP

VIA FEDERAL EXPRESS

November 4, 2012

Craig Melodia, Esq.
Associate Regional Counsel
U.S. Environmental Protection Agency
Mail Code C-14J
77 West Jackson Boulevard
Chicago, IL 60604

FIRM / AFFILIATE OFFICES

Abu Dhabi	Moscow
Barcelona	Munich
Beijing	New Jersey
Boston	New York
Brussels	Orange County
Chicago	Paris
Doha	Riyadh
Dubai	Rome
Frankfurt	San Diego
Hamburg	San Francisco
Hong Kong	Shanghai
Houston	Silicon Valley
London	Singapore
Los Angeles	Tokyo
Madrid	Washington, D.C.
Milan	

File No. 041930-0001

Re: Comments On The Hybrid Remedy Proposed For The Ashland/Northern States Power Lakefront Superfund Site

Dear Mr. Melodia:

Thank you for the opportunity to meet with you regarding our technical concerns with the hybrid remedy that was identified in the Record of Decision ("ROD") for the Ashland/Northern States Power Lakefront Superfund Site ("Site"), and for your letter dated October 23, 2012.

In your letter, you described the Environmental Protection Agency's ("EPA") view of the events leading to the selection of the hybrid remedy, and the development of Weston's Technical Memorandum regarding the "Conceptual Geotechnical Assessment for Sediment Removal at the Ashland/Northern States Power Lakefront Site in Ashland, Wisconsin" ("Weston Report"). You also indicated that the EPA and the Wisconsin Department of Natural Resources ("WDNR") would review the materials submitted by the Northern States Power Company of Wisconsin ("NSPW") on October 15, 2012, and determine whether to add them to the administrative record for the Site.

As you know, NSPW is the only entity that has cooperated with the agencies in taking any significant action to perform work or fund investigation or cleanup efforts at the Site—even though other Potentially Responsible Parties ("PRPs") have been identified. Under the agencies' oversight, NSPW has undertaken extensive investigatory, remedial, and other activities at the entire Site, with positive results.¹ Most recently, NSPW agreed to perform the cleanup of the

¹ By way of example, NSPW has performed various activities at the Site in cooperation with EPA and consistent with the NCP, including, without limitation, the performance of a Remedial Investigation and

groundwater and soils on the on-land portion of the Site pursuant to the *Uplands Consent Decree Between The United States, Wisconsin, NSPW, and the Bad River and Red Cliff Bands of the Lake Superior Tribe of Chippewa Indians* ("Phase I CD")—a \$40 million commitment, which was recently approved by the court on October 18, 2012. Consistent with this track record, NSPW hopes to continue working cooperatively with the agencies towards a reasonable remedy for the Phase II Sediment portion of the Site. While we do not agree with the recitation of developments at the Site set forth in your October 23 letter, or EPA's refusal to accept materials pursuant to 40 C.F.R. §300.825(a) at this time, we appreciate EPA's agreement to add the company's submission to the record pursuant to 40 C.F.R. §300.825(c), to the extent that it: (1) contains significant information not contained elsewhere in the record; (2) could not have been submitted during the comment period; or (3) substantially supports the need to alter the selected remedy.

As noted in our letter dated October 15, 2012, we believe it is appropriate to open the record to technical information responding to the Weston Report, and to other issues raised for the first time in the Record of Decision ("ROD"), or later—particularly to the extent that such information flags serious safety concerns with the selected remedy. Because the Weston Report was not issued until after the ROD was signed, and NSPW's comments evaluate the safety and technical viability of the design modifications proposed by Weston, NSPW could not have submitted this information during the public comment period, and is therefore entitled to have its comments added to the record pursuant to 40 C.F.R. 300.825(c). Moreover, NSPW's submission should also be added to the record pursuant to 40 C.F.R. 300.825(a) because it contains technical information "concern[ing] a portion of a response action decision that the decision document . . . reserves to be decided at a later date"—namely, whether a hybrid remedy or wet dredge remedy is best suited for the Site.

Consistent with this position, we plan to provide the October 15 materials to Patricia Krause, with a request that they be included in the administrative record for the Site. We sincerely hope that our submission of these materials will benefit the ongoing sediment negotiations between NSPW and the agencies. We are making this submission as a formality, understanding that you are still evaluating whether EPA will accept these documents into the administrative record, as we believe they ultimately should and will be accepted.

Further, in your letter you indicate that the agency is interested in conducting additional studies to evaluate basal heave risks, and in a letter from Scott Hansen, dated October 30, 2012, EPA asked the company to perform certain investigations during the Phase I pre-design and design work that relate to the sediment remedy, including borings that would purportedly evaluate basal heave risks. The company in this particular instance is agreeable to performing the work requested in Scott Hansen's October 30, 2012 letter, even though the company is not required to undertake Phase II work as part of the Phase I Remedial Design/Remedial Action Consent Decree, with the understanding that the results will be included in the administrative

Feasibility Study ("RI/FS), soil, groundwater and sediment sampling, ecological and human health risk assessments, environmental forensic investigations, site characterizations, historic PRP investigations, and interim removal actions.

LATHAM & WATKINS LLP

record for the Site.² We are agreeing to undertake such work as part of the Phase I pre-design Work, to the extent described in our responsive comments posted on Friday, November 2, primarily so that we can keep on an accelerated Phase I schedule with the goal of completing the primary construction activity for Phase I in 2013. We do not want to slow down to discuss the relevance or merits of the proposed data collection for Phase II purposes, because we will then lose our ability to maximize construction of the Phase I remedy in 2013. To the extent the agencies want to discuss additional work to support negotiations over a Phase II settlement going forward, the parties should consider developing a separate administrative vehicle that would govern any additional sediment-related investigations.

We look forward to further discussions regarding our technical concerns and possible solutions related to the proposed sediment remedy.

Very truly yours,



Kelly E. Richardson
of LATHAM & WATKINS, LLP

cc: Thomas Benson
Kris Hess
John Robinson
Lacey Cochart
Kristen Carney

²

The agencies' request for this information demonstrates the need for all data and analyses related to the sediment remedy, including our sediment reports, to be included in the decision-making process and administrative record for same.